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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

PHOEBE LANG et al., Plaintiffs and Respondents, v. PETALUMA HILLS FARM, LLC, et al., Defendants and Appellants.	A156614 (Sonoma County Super. Ct. No. SCV-263292)

Local residents filed this lawsuit because they were concerned about cannabis-related activity at a property on Purvine Road in Petaluma ("the property"). The trial court issued a preliminary injunction prohibiting unlawful cannabis cultivation and cannabis tourism at the property. Defendants Petaluma Hills Farm, LLC, Sonoma Hills Farm, LLC, the Sonoma County Experience, LLC, Samuel J. Magruder, Gian Paolo Veronese, Michael W. Harden, and Jared Rivera (collectively "the Farm") appeal the preliminary injunction, the court's denial of their special motion to strike the complaint pursuant to Code of Civil Procedure section 425.16, the court's decision to grant related attorney fees against the Farm, and the court's denial of a motion to tax costs. We dismiss the appeal from

the costs order, direct the trial court to modify the injunction as it relates to Sonoma County Experience, and otherwise affirm.

BACKGROUND

A.

California law requires a state license for commercial cannabis activity. (Bus. & Prof. Code, §§ 26038 [civil penalties for engaging in commercial cannabis activity without a license]; 26053 [license required for all commercial cannabis activity].) "Commercial cannabis activity" (both medical and non-medical) includes "the cultivation, possession, . . . processing, [or] storing . . . of cannabis and cannabis products as provided for in this division." (Bus. & Prof. Code § 26001, subds. (k), (ae)-(af).) Cities and counties are authorized to adopt local laws regulating cannabis. (Bus. & Prof. Code, § 26200.) Commercial cannabis activity is unlawful without a state license and (where required) a local permit. (Bus. & Prof. Code, §§ 26032, subd. (a)(1)-(2), 26038; see also Bus. & Prof. Code § 26055, subd. (d).)

Sonoma County requires a land use permit for commercial cannabis activity. (Sonoma County Code, §§ 26-88-250, subds. (b), (d); 26-88-254, subd. (c)). In addition, Sonoma County prohibits "[t]asting, promotional activities, and events related to commercial cannabis activities." (*Id.,* § 26-88-250, subd. (c)(5).) Cultivation of cannabis for personal use may not exceed 100 square feet per residence. (*Id.,* § 26-88-258, subd. (b)(2).) Any activity that violates these provisions is a public nuisance. (*Id.,* § 1-7, subd. (e).)

B.

Phoebe Lang, Ayn Garvisch, and Britt Christiansen (collectively, "the Purvine neighbors") discovered that the Farm was cultivating

cannabis near their homes on Purvine Road. Together with a newly-formed organization called No Pot on Purvine and other plaintiffs, who have all since been dismissed from the case, the Purvine neighbors filed this lawsuit against the Farm. They allege that the Farm is engaged in unpermitted and unlicensed commercial cannabis cultivation and hosts unlawful cannabis-related tastings, promotional events, and tours. They further allege that these activities violate state and local laws regulating cannabis cultivation and uses and constitute nuisances. The same month that the Purvine neighbors filed this lawsuit, the Farm harvested all of the cannabis that had been cultivated at the property.

The trial court issued a preliminary injunction that (1) prohibits the Farm from engaging in commercial cultivation of cannabis at the property for medicinal or recreational purposes without a Sonoma County permit and state license; (2) prohibits the Farm from engaging in personal cannabis cultivation at the property in excess of the limits imposed by the Sonoma County Cannabis Ordinance (Sonoma County Code, § 26-88-258, subd. (b)(2)) and the Medicinal and Adult Use Cannabis Regulation and Safety Act (Bus. & Prof. Code, § 26038); and (3) prohibits the Farm from "hosting, sponsoring, organizing, holding or participating in tastings, promotional activities or events related to cannabis uses" at the property in violation of section 26-88-250, subdivision (c) of the Sonoma County Code.

The court also denied the Farm's special motion to strike the complaint pursuant to Code of Civil Procedure section 425.16, concluded the motion was frivolous, and awarded attorney fees against the Farm. When three of the original plaintiffs voluntarily dismissed their claims, the Farm sought costs against them, but the court granted

the dismissed plaintiffs' motion to strike or tax costs against the Farm, without prejudice to any party bringing a new claim for costs at the end of the litigation.

DISCUSSION

A.

Motion to Strike the Complaint

1.

We reject the Farm's contention that the trial court erred in denying its motion to strike the complaint.

Code of Civil Procedure section 425.16 authorizes dismissal of a claim if it arises from an act in furtherance of the defendant's right of petition or free speech, unless the plaintiff is likely to prevail. (Code Civ. Proc., § 425.16, subd. (b)(1).) A court must first determine whether the claim arises out of the defendant's protected speech or petitioning activity. (Code Civ. Proc., § 425.16, subd. (e).) Only if the movant has met this threshold requirement must the court determine whether the plaintiff has demonstrated a reasonable probability of success. (See, e.g., *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 811 (*Wang*).) We review de novo whether Code of Civil Procedure section 425.16 applies. (*Sonoma Media Investments LLC v. Superior Court* (2019) 34 Cal.App.5th 24, 33.)

To determine whether a complaint is covered by Code of Civil Procedure section 425.16, we focus on " ' "the defendant's activity . . . that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." ' " (*Richmond Compassionate Care Collective v. 7 Stars Holistic Found., Inc.* (2019) 32 Cal.App.5th 458, 467 (*Richmond Compassionate Care Collective*); see

also *Baral v. Schnitt* (2016) 1 Cal.5th 376, 393, 396 (*Baral*).) The defendant must establish " ' that *the defendant's conduct by which plaintiff claims to have been injured* ' " is protected activity. (*Richmond Compassionate Care Collective*, *supra*, 32 Cal.App.5th at pp. 467-468 [citing Code Civ. Proc., § 425.16, subd. (e)].) We accept as true the facts pled in the complaint, and we consider the pleadings as well as the affidavits submitted in connection with the motion stating the facts on which liability is based. (*Ibid.*; Code Civ. Proc, § 425.16, subd. (b)(2).)[1]

The complaint here alleges liability for unlawful business practices and nuisance based on the Farm's unpermitted cannabis cultivation; hosting of cannabis tastings and promotional events; hosting of unpermitted non-cannabis events; and performing of unpermitted renovations. The complaint alleges these activities are each prohibited by the Sonoma County Code. The Farm offers three arguments that these claims arise from protected speech or petitioning activity.

First, the Farm contends that the complaint attacks its efforts to secure a cannabis cultivation permit, as well as its protected speech in displaying posters describing its plans. However, while the complaint mentions that the Farm applied for a permit and references its display of posters concerning its development plans, none of the claims base

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[1] The Farm contends that the trial court abused its discretion in denying its evidentiary objections to the Purvine neighbors' evidence submitted in opposition to its Code of Civil Procedure section 425.16 motion. However, we need not address the propriety of the court's evidentiary rulings because we conclude that the Farm is unable to meet its threshold burden even without considering the evidence to which it objected.

liability on such activities. Indeed, the complaint challenges the Farm's cultivation of cannabis *without* a permit. The references to speech or permitting are merely incidental or provide context. (*Richmond Compassionate Care Collective*, *supra*, 32 Cal.App.5th at p. 470 [incidental references to protected activity do not provide basis for striking claim under Code of Civil Procedure section 425.16]; see also *Baral*, *supra*, 1 Cal.5th at p. 394 ["Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken"].)

Second, the Farm contends that the complaint is based on protected activity because the plaintiffs' purpose was to oppose the Farm's permit application. The plaintiffs' subjective intent, however, is irrelevant under Code of Civil Procedure section 425.16. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*).)

Third, the Farm argues that, contrary to the allegations in the complaint, it was not cultivating commercial cannabis. But for the threshold determination of whether the plaintiffs' claims arise out of defendants' protected activity, " '[t]he question is what is pled—not what is proven.' " (*Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal.App.5th 203, 217; see also *Navellier v. Sletten* (2002) 29 Cal.4th 82, 94 [" 'the threshold question of whether the [] statute [potentially] applies' " should not be confused " 'with the question whether [an opposing plaintiff] has established a probability of success on the merits.' "].)

Accordingly, we affirm the trial court's denial of the Farm's motion to strike.

2.

We likewise affirm the trial court's award of attorney fees to the Purvine neighbors. (See Code Civ. Proc., § 425.16, subd. (c)(1) [authorizing award of attorney fees and costs where, inter alia, the motion to strike is frivolous]; see also Code Civ. Proc., § 128.5, subd. (b)(2).) As explained, the claims at issue in this case plainly do not base liability on protected activity. Although the Farm's motion was based in part on the Purvine neighbor's alleged motives, it is well-established that such intent is irrelevant. (See *City of Cotati*, *supra*, 29 Cal.4th at p. 78.) It is equally indisputable that incidental references to protected activity are insufficient to bring a cause of action within Code of Civil Procedure section 425.16, subdivision (e) – a rule the Farm acknowledged in its motion but failed to apply. We find no abuse of discretion. (See *Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 450 [fee award subject to review for abuse of discretion].)

However, we deny as procedurally improper the Purvine neighbors' request that we award appellate fees as sanctions for a frivolous appeal. (See Cal. Rules of Court, rule 8.276(b)(1) [party's request for sanctions must be made by motion, supported by declaration, and filed within ten days of appellants' reply brief]; see also *Bak v. MCL Fin. Grp., Inc.* (2009) 170 Cal.App.4th 1118, 1127-1128 [denying request for appellate fees for frivolous appeal based on failure to comply with Cal. Rules of Court, rule 8.276(b)(1)].)

B.

Preliminary Injunction

The Farm raises several arguments challenging the trial court's issuance of the preliminary injunction.

1.

We first address a threshold issue: the Farm's contention that the preliminary injunction is improper because there is no private right of action to enforce the County zoning ordinance related to cannabis.

The argument is meritless. Section 1-7.2 of the Sonoma County Code grants a private right of action for zoning violations (Sonoma County Code, §§ 1-7.2 [private right of action for violation of § 26-92-200]; 26-92-200, subd. (a) [requiring all land uses to comply with code]), which include the cannabis regulations at issue here. (See *id*. §§ 26-88-250 [commercial cannabis uses], 26-88-254 [commercial cannabis cultivation], 26-88-258 [personal cannabis cultivation].) The Farm points to a code provision that permits enforcement by county agencies, but that provision does not purport to exclude private rights of action or otherwise trump section 1-7.2.[2] Nothing in law or logic precludes the county from granting enforcement authority to both its residents and itself.

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[2] We note that Sonoma County recently amended its code. (See Sonoma County Ord. No. 6322, Sept. 1, 2020.) Even assuming the changes apply here, they would not affect our conclusion. The private right of action in Sonoma County Code section 1-7.2 remains unchanged. The Cannabis Ordinance now specifies that its provisions are "subject to enforcement under Chapter 1," which includes Sonoma County Code section 1-7.2. The County also may bring enforcement actions under Chapter 1, and the remedies in that chapter are cumulative. (Sonoma County Code, § 1-7, subds. (a), (h).)

2.

In considering the Farm's challenge to the merits of the preliminary injunction, we review the trial court's ultimate decision for abuse of discretion. (See *Howard S. Wright Construction Company v. Superior Court* (2003) 106 Cal.App.4th 314, 320.) We review legal questions de novo, and we review factual findings for substantial evidence. (*Ibid.*) Applying these standards, we conclude the injunction should be modified in part with respect to Sonoma County Experience but otherwise find no error.

a.

First, the Farm contends that the preliminary injunction was unwarranted because there was insufficient evidence of past illegal cultivation. We disagree.

The Purvine neighbors presented substantial evidence that before they filed this lawsuit, the Farm grew cannabis for commercial purposes without a permit or license. Sonya Arriaga, a former law enforcement officer and licensed private investigator specializing in narcotics, observed marijuana being grown at the property during a visit in August 2018 and took photographs. She estimated that she observed 50 to 60 large marijuana plants growing outdoors there, covering an area of approximately 1,000 square feet. In addition, Arriaga observed approximately 100 young cannabis plants growing inside a 300 to 400-foot greenhouse. She estimated that the outdoor plants could generate $225,000 to $450,000 of gross revenue if sold at then-prevalent retail prices. The Purvine neighbors also presented other evidence consistent with Arriaga's observations, including satellite images of the areas where cannabis was cultivated on the

property and declarations from Britt Christiansen and Ayn Garvisch asserting that they observed a "cannabis field" at the property during summer 2018. Evidence also supported the court's conclusion that at the relevant time the Farm had neither a state license nor a Sonoma County permit for commercial cannabis cultivation.

Although Jared Rivera, a resident at the property, submitted a declaration disputing the amount of cannabis grown and asserting that all of the cannabis was for his own personal medical use, the trial court was not required to credit his account, particularly in light of Arriaga's assertion that she observed cannabis cultivation far in excess of the 100 square feet per residence allowable as personal cultivation.[3] (Sonoma County Code, § 26-88-258, subd. (b)(2).) We may not reweigh conflicting evidence or the credibility of the declarants. (*City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, 427.)

The trial court therefore reasonably concluded that the Farm had engaged in unlawful commercial cannabis cultivation. (See Sonoma County Code, §§ 26-88-254, subd. (c), 26-88-250, subds. (c)-(d)); Bus. & Prof. Code, §§ 26038, 26053.)

b.

The Farm next asserts that because it stopped cultivating cannabis on the property in October 2018, the trial court improperly issued the injunction without requiring evidence of imminent harm or an ongoing nuisance in violation of law. We disagree.

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[3] The Farm also seeks to rely on evidence excluded by the trial court that a Sonoma County official inspected the property in late October 2018 and concluded there was no violation. Even were we to consider this evidence, it would not change our conclusion that the court's order was supported by substantial evidence.

The Farm relies on the principle that injunctive relief " 'is dependent on present and future conditions rather than solely on those existing when the suit was brought.' " (*Mallon v. Long Beach* (1958) 164 Cal.App.2d 178, 188 (*Mallon*)). However, "[t]he mere fact that a defendant refrains from unlawful conduct" during a lawsuit does not "preclude the trial court from issuing injunctive relief to prevent a . . . continuation" of that conduct. (*Aguilar v. Avis Rent A Car System*, *Inc.* (1999) 21 Cal.4th 121, 133 (plur. opn. of George, C.J.); see also *Robinson v. U-Haul Co. of California* (2016) 4 Cal.App.5th 304, 315 (*Robinson*) ["[T]here is no hard-and-fast rule that a party's discontinuance of illegal behavior makes injunctive relief ... unavailable."].) Rather, the court may consider whether the defendant's cessation of unlawful conduct is voluntary and in good faith, as well as whether the cessation is temporary or permanent. (See *Robinson*, *supra*, 4 Cal.App.5th at p. 316 ["Where, as here, a company has not taken action to bind itself legally to a violation-free future, there may be reason to doubt the bona fides of its newly established law-abiding policy."]; *Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641, 1659 ["Compliance with a court order is not voluntary discontinuance of prohibited conduct."].) A defendant's decision to pause contested conduct does not preclude the court from concluding, based on all the circumstances, that there is a "reasonable probability that past acts complained of will recur[.]" (*Mallon*, *supra*, 164 Cal.App.2d at p. 190; see also *Engle v. Oroville* (1965) 238 Cal.App.2d 266, 270 [where defendants have abated the nuisance, the propriety of injunctive relief turns on whether there is any "possibility the nuisance will or can recur"].)

Here, after the Purvine neighbors filed their initial complaint on October 9, 2018, the trial court issued a temporary restraining order on October 18 prohibiting unpermitted and unlicensed commercial cannabis cultivation. The Farm harvested all of the cannabis growing at the property by some point in October although the parties dispute whether the filing of the lawsuit prompted the removal. According to Rivera's declaration, he harvested the cannabis by October 5, before he learned of the lawsuit. However, the Purvine neighbors presented evidence that the cannabis was removed after they filed their complaint. In addition, in exchange for the dissolution of the temporary restraining order, the Farm subsequently agreed that, until December 7, 2018, it would refrain from growing cannabis without a permit and from holding promotional activities or events relating to cannabis uses or without a permit at the property.

We conclude there was substantial evidence to support the trial court's implicit conclusion that the challenged activities were likely to recur. The court could have reasonably found that the Farm only ceased cultivating cannabis in response to the lawsuit. Further, the Farm expressly agreed to cease the challenged conduct only until December 7. The Farm never acknowledged any wrongdoing and certainly never agreed to any lasting change in its practices. Under these circumstances, the trial court properly could have concluded the injunction was necessary to prevent the Farm from resuming its past unlawful conduct. (See, e.g., *Phipps v. Saddleback Valley Unified Sch. Dist.* (1988) 204 Cal.App.3d 1110, 1119 [where student was allowed to return to school as a result of school district's compliance with preliminary injunction, but "there was no guarantee the district would

not change its tune," court did not abuse its discretion in issuing permanent injunction].)

c.

We reject the Farm's argument that the trial court erred in concluding that its activities constituted illegal cannabis tourism under Sonoma County Code section 26-88-250, subdivision (c).

The Farm contends that the evidence demonstrates only tastings, promotional activities, and events relating to Rivera's personal medical cannabis, rather than any commercial activity. However, as discussed above, there was substantial evidence to support the trial court's conclusion that the Farm was cultivating cannabis for commercial purposes – cultivation that was ten times the size allowed for personal use under Sonoma County Code section 26-88-258, subdivision (b)(2). The court was thus likewise justified in concluding that the tastings, promotional activities, and other events occurring at the Farm's property were related to commercial cannabis activities. In light of this conclusion, we need not reach the Farm's contention that the court erroneously interpreted the Sonoma County Code to prohibit tourism relating to personal cannabis uses.

d.

The Farm also challenges the trial court's conclusion that all the defendants were acting in concert. With one exception, we disagree.

The trial court properly relied on evidence that Sonoma Hills Farm, the property owner, and Petaluma Hills Farm, the operator of the proposed cannabis venture and a lessee of the property, have overlapping ownership and management. Individual defendants Mike Harden, Sam Magruder, and Gian Paolo Veronese are principals in the

two companies, and their names are each listed on the cannabis permit application for the property. A flyer submitted by the Farm identifies Petaluma Hills Farm as working "in partnership" with Sonoma Hills Farm. Record evidence also identifies Rivera as the "property manager", part of the Petaluma Hills Farm "team," a tenant, and a "partner" of the other defendants. Jared Giammona, the principal of Sonoma County Experience, dealt with Magruder as an agent of Sonoma Hills Farm in arranging to hold cannabis tours at the property. Magruder led a tour through the cannabis garden for a visit organized by Sonoma County Experience, and Rivera also helped lead cannabis tours organized by Sonoma County Experience. Other evidence in the record indicates that Magruder was present at the property on a near daily basis. In light of the intertwined nature of the activities of Sonoma Hills Farm, Petaluma Hills Farm, Magruder, Harden, Veronese, and Rivera, we conclude the trial court did not abuse its discretion in issuing injunctive relief against these defendants.

With respect to defendant Sonoma County Experience, the trial court properly enjoined it from engaging in unlawful tourism activities relating to commercial cannabis. However, the record contains insufficient evidence that Sonoma County Experience acted in concert with the other defendants to cultivate cannabis. We therefore conclude that the injunction's prohibitions on unlawful commercial cannabis cultivation and unlawful personal cultivation should not run against Sonoma County Experience.

e.

Finally, we reject the Farm's argument that the preliminary injunction order fails to provide sufficient notice of the acts it prohibits.

This is not a case in which the parties disagree as to whether a particular set of facts constitutes unlawful behavior and the injunction fails to provide guidance on that question. The Farm disputes whether the cannabis cultivation at the property exceeded the allowance for personal cannabis and was commercial in nature, not whether it would be illegal if it did. In addition, the Farm asserts that any tourism activities that occurred were not commercial because they involved personal cannabis cultivation.

The trial court rejected this view of the facts and issued an injunction that clearly prohibits commercial cannabis cultivation without a permit and license; personal cannabis cultivation in excess of the limits imposed by the Sonoma County Cannabis Ordinance (Sonoma County Code, § 26-88-258, subd. (b)(2)) and Medicinal and Adult Use Cannabis Regulation and Safety Act (Bus. & Prof. Code, § 26038); and "hosting, sponsoring, organizing, holding or participating in tastings, promotional activities or events related to cannabis uses" at the Farm's property in violation of Sonoma County Code section 26-88-250, subdivision (c). (See *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 415-416 [" 'in determining whether the defendant has been given sufficient notice of the conduct proscribed or compelled, the language of the injunction must be interpreted in light of the record which discloses the kind of conduct that is sought to be enjoined' "].)

C.

Costs Order

The Farm asserts that the trial court abused its discretion in denying its motion for costs against the plaintiffs who voluntarily dismissed their claims without prejudice, and in granting the dismissed plaintiffs' motion to strike or tax costs. We conclude that the court's order is not appealable.

Ordinarily, under the "one final judgment" rule, " 'an order or judgment that fails to dispose of all claims between the litigants is not appealable' " until final resolution of the case. (*Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 9 (*Ram*), citing Code Civ. Proc., § 904.1, subd. (a).) However, even where outstanding issues as to some parties remain in the case, "a direct appeal may be taken from . . . a judgment that is final as to a party." (*Aixtron, Inc. v. Veeco Instruments Inc.* (2020) 52 Cal.App.5th 360, 387; see also *Ram*, *supra*, 234 Cal.App.4th at p. 9; *Justus v. Atchison* (1977) 19 Cal.3d 564, 568 (*Justus*), disapproved of on another ground by *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171.) Accordingly, parties who remain in the litigation may appeal orders that finally determine the rights of another party. (See, e.g., *Justus*, *supra*, 19 Cal.3d at p. 568 [plaintiffs who remained in case could appeal dismissal order that finally determined the rights of co-plaintiffs who were dismissed from the case].)

Here, however, after the plaintiffs voluntarily dismissed their claims without prejudice, the trial court granted the motion to strike or tax costs "without prejudice to any party bringing a new claim for costs at the end of the litigation." The court's order thus failed to "definitively adjudicate[]" the rights or liabilities of any party. (*Justus*,

supra, 19 Cal.3d at p. 568.) We therefore dismiss the Farm's appeal from the trial court's costs order. (See *Aleman v. AirTouch Cellular* (2012) 209 Cal.App.4th 556, 586 [where trial court denied motion without prejudice and made clear the party could renew its motion, denial of motion was not appealable under exception to the one final judgment rule].)

DISPOSITION

The Farm's appeal from the trial court's order granting the Purvine neighbors' motion to tax costs without prejudice is dismissed. On remand, the trial court shall modify the injunction to reflect that the prohibitions on unlawful commercial and personal cannabis cultivation do not run against Sonoma County Experience. In all other respects, the orders appealed from are affirmed. The Purvine neighbors are entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3), (5).)

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BURNS, J.

We concur:

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SIMONS, ACTING P.J.

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NEEDHAM, J.

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